

On October 2, 1984 appellant, then a 28-year-old shipment clerk, sustained an employment-related muscle spasm and disc herniation at L5-S1 when she slipped on a tile floor. She had surgery on February 5, 1985 and returned to full duty in April 1985. Appellant continued to work until May 1990 and missed intermittent periods thereafter until she stopped

work in the fall of 1991 and had additional surgery on December 4, 1991. She returned to limited duty for four hours a day from February 10, 1992 to March 16, 1993, returned to four hours of daily limited duty on July 26, 1993, worked until August 9, 1993, did not return and was placed on the periodic rolls.¹

Appellant moved to Michigan in 1999 and in August 2001 the Office referred her to Adolph Cwik, a rehabilitation counselor, for vocational rehabilitation. By decision dated November 21, 2003, the Office reduced her monetary compensation to zero based on her capacity to earn wages as a surveillance systems monitor. Appellant timely requested a hearing and in an April 13, 2004 decision, an Office hearing representative reversed the November 21, 2003 decision on the grounds that the medical evidence did not establish that she was capable of working eight hours daily due to the October 2, 1984 employment injury.² She was returned to the periodic rolls and received appropriate retroactive compensation.

On February 7, 2007 the Office referred appellant to Dr. Jeffrey F. Lawley, an osteopath Board-certified in orthopedic surgery, for a second opinion evaluation. In an August 18, 2007 report, Dr. Lawley noted his review of the medical records including magnetic resonance imaging (MRI) scan films, the history of injury and her medical history and complaints of constant, severe lower back pain that at times radiated to the left lower extremity with occasional left lower extremity numbness. Straight leg raising test was positive on the left and negative on the right. Sensory examination for both lower extremities was normal with the exception of sharp pinprick at the lateral border of the left leg and foot consistent with the S1 dermatomal distribution. Appellant was unable to toe walk on the left because of complaints of pain and weakness but could heel walk for a short distance. Dr. Lawley noted x-ray findings of postoperative changes and significant disc degeneration at the L5-S1 level and facet joint early degenerative changes consistent with age. He diagnosed status post lumbar laminectomy times two with persistent lower back and left leg pain and advised that appellant had residuals of the L5-S1 disc herniation with a sensory deficit but no evidence of muscle spasm. Dr. Lawley opined that she could not return to her date-of-injury position but could work eight hours a day with permanent restrictions that she stand and walk to her tolerance and avoid excessive repetitive bending, twisting and reaching. He provided a 10-pound restriction on lifting, pushing and pulling and recommended a repeat MRI scan study, a home exercise program and that appellant lose weight, noting that she was morbidly obese.

In February 2008, the Office again referred appellant to Mr. Cwik for vocational rehabilitation. On May 25, 2008 Mr. Cwik identified the positions of general office clerk, cashier and surveillance systems monitor, finding that they were within the sedentary strength category, within her work restrictions and qualification and reasonably available in the local labor market. Appellant began a job search under protest. In a June 18, 2008 report,

¹ Nonwork-related injuries include a left carpal tunnel syndrome release performed on August 10, 1987 and a December 1993 motor vehicle accident that resulted in fractures to the pelvis and left clavicle and a closed head injury.

² Appellant had subsequently acquired the medical condition polycythemia vera. The hearing representative determined that the record was unclear as to whether appellant's disability to work eight hours a day was due to work-related and preexisting conditions or to the subsequently acquired condition.

Dr. Craig Caldwell, an osteopath Board-certified in family practice, noted appellant's report that the job search made her back hurt more, that she could no longer shop and needed help with her housework. On physical examination, he noted that appellant could not stand fully erect and had limitations of lumbar spine motion. Dr. Caldwell diagnosed chronic low back pain, prescribed a single post cane and medications and advised that she could perform surveillance or uncomplicated clerical work for short periods at a time, as long as she could stand and reposition herself at will, but that this would be difficult for her due to weather-related and transportation issues. By report dated November 6, 2008, he reviewed Dr. Lawley's report and stated that he substantially agreed with his findings and had further reviewed the job description for surveillance system monitor, advising that he believed that she could perform the position as described.

By letter dated December 3, 2008, the Office proposed to reduce appellant's compensation benefits based on her capacity to earn wages as a surveillance system monitor.³ It advised her that, if she disagreed with the proposed reduction, she should submit additional evidence or argument within 30 days. Appellant disagreed with the proposed reduction, stating that the physicians did not comprehend the amount of unbearable pain she had. In a January 9, 2009 decision, the Office reduced her compensation benefits, effective January 18, 2009, based on her capacity to earn wages as a surveillance system monitor. It credited the opinions of the office referral physician, Dr. Lawley, and appellant's attending physician, Dr. Caldwell, both of whom advised that she was medically capable of performing the duties of surveillance system monitor.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.⁴ An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.⁵

Section 8115 of the Federal Employees' Compensation Act⁶ and Office regulations provide that wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity or the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, usual employment, age, qualifications for other

³ The physical demands of the position are sedentary, exerting up to 10 pounds of force occasionally and a negligible amount of force frequently.

⁴ *James M. Frasher*, 53 ECAB 794 (2002).

⁵ 20 C.F.R. §§ 10.402, 10.403; *John D. Jackson*, 55 ECAB 465 (2004).

⁶ 5 U.S.C. §§ 8101-8193.

employment, the availability of suitable employment and other factors or circumstances which may affect his or her wage-earning capacity in the disabled condition.⁷

The Office must initially determine a claimant's medical condition and work restrictions before selecting an appropriate position that reflects his or her wage-earning capacity. The medical evidence upon which it relies on must provide a detailed description of the condition.⁸ Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.⁹

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by the Office for selection of a position listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open market, that fits that employee's capabilities with regard to his or her physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service.¹⁰ Finally, application of the principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.¹¹

In determining an employee's wage-earning capacity based on a position deemed suitable, but not actually held, the Office must consider the degree of physical impairment, including impairments resulting from both injury-related and preexisting conditions, but not impairments resulting from post injury or subsequently acquired conditions. Any incapacity to perform the duties of the selected position resulting from subsequently acquired conditions is immaterial to the loss of wage-earning capacity that can be attributed to the accepted employment injury and for which appellant may receive compensation.¹²

ANALYSIS

The medical evidence as characterized by Dr. Lawley's August 18, 2007 report established that appellant was no longer totally disabled and the Office referred her for vocational rehabilitation in February 2008. The rehabilitation counselor, Mr. Cwik, identified three positions, general office clerk, cashier and surveillance systems monitor, that he felt fit her

⁷ 5 U.S.C. § 8115; 20 C.F.R. § 10.520; *John D. Jackson*, *supra* note 5.

⁸ *William H. Woods*, 51 ECAB 619 (2000).

⁹ *John D. Jackson*, *supra* note 5.

¹⁰ *James M. Frasher*, *supra* note 4.

¹¹ The formula for determining loss of wage-earning capacity based on actual earnings, developed in *Albert C. Shadrick*, 5 ECAB 376 (1953), has been codified at 20 C.F.R. § 10.403 of the Office's regulations. The Office calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the current pay rate for the date-of-injury job. See *J.C.*, 58 ECAB ____ (Docket No. 07-1165, issued September 21, 2007).

¹² *John D. Jackson*, *supra* note 5.

capabilities, noting that the positions were within the sedentary strength category and her work restrictions and qualifications and reasonably available in the local labor market. The Office determined that appellant had the capacity to earn wages as a surveillance systems monitor.

The Board finds that the Office met its burden of proof in reducing appellant's wage-earning capacity based on her ability to earn wages as a surveillance systems monitor. The relevant medical evidence includes Dr. Lawley's August 18, 2007 report, in which he advised that appellant could work for eight hours a day with permanent restrictions that she stand and walk to her tolerance and avoid excessive repetitive bending, twisting, reaching and a 10-pound weight restriction on lifting, pushing and pulling. In a November 6, 2008 report, Dr. Caldwell, an attending physician, advised that he had reviewed Dr. Lawley's report and substantially agreed with his findings and, after review of the job description, opined that she could perform the surveillance systems monitor position. The medical evidence of record therefore established that appellant could perform the duties of the surveillance systems monitor position, which is a sedentary position with a 10-pound weight restriction¹³

The Board finds that the Office considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment, age and employment qualifications, in determining that the position of surveillance system monitor represented her wage-earning capacity.¹⁴ Despite appellant's contention that pain precluded her for working, medical evidence did not establish that. The evidence of record establishes that she had the requisite physical ability, skill and experience to perform the position and that such a position was reasonably available within the general labor market of her commuting area. The Office therefore properly determined that the position of contract clerk reflected appellant's wage-earning capacity and using the *Shadrick* formula,¹⁵ properly reduced her compensation effective June 10, 2007.¹⁶

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation benefits based on her capacity to earn wages in the constructed position of surveillance systems monitor.

¹³ *William H. Woods, supra* note 8; *see supra* note 3.

¹⁴ *James M. Frasher, supra* note 4.

¹⁵ *Shadrick supra* note 11.

¹⁶ *James Smith, 53 ECAB 188 (2001).*

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 9, 2009 is affirmed.

Issued: December 24, 2009
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board